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Parvin v. State Supplemental Appellant's Brief Dckt. 40824

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL PARVIN,)	
)	NO. 40824
Petitioner-Appellant,)	
)	CANYON COUNTY NO. CV 2008-9712
v.)	
)	
STATE OF IDAHO ,)	SUPPLEMENTAL APPELLANT'S
)	BRIEF
Respondent.)	
_____)	

SUPPLEMENTAL BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON

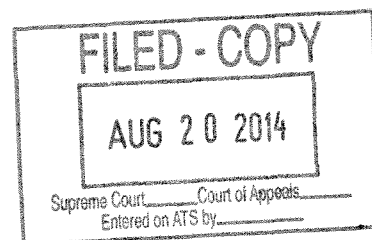
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STATEMENT OF THE CASE

Nature of the Case

In his Appellant's Brief, Mr. Parvin asserts that the district court erred when it found that his attorney's conduct was not deficient for a number of reasons, including its contention that the Idaho Court of Appeals' Opinion in *State v. Day*, 131 Idaho 184 (Ct. App. 1998) and its progeny, have failed to inform defense attorneys of what is required of them in order to prevent a district court from losing jurisdiction over Idaho Criminal Rule 35 motions. He filed a Reply Brief in response to the State's brief, in which he took issue with a number of the State's arguments.

After oral argument was set in this matter, the Idaho Supreme Court's decision in *Murphy v. State* (Docket No. 40483) became final, and this Court issued an order vacating oral argument and providing Mr. Parvin the opportunity to file supplemental briefing on what affect, if any, *Murphy* has on his case. (Order (July 9, 2014).) This Supplemental Appellant's Brief is necessary to explain why the Idaho Supreme Court's decision in *Murphy* does not bar Mr. Parvin from obtaining relief on appeal.

Mr. Parvin will not restate the argument and facts contained in his Appellant's and Reply Briefs, except as necessary, as this brief is intended solely to address the issue of whether he is barred from obtaining relief under *Murphy*.

Statement of the Facts and Course of Proceedings

As relevant to this Supplemental Appellant's Brief and as contained in his Appellant's Brief, the course of proceedings of this case is as follows:

Following his loss on direct appeal, Mr. Parvin filed a timely Petition for Post-Conviction Relief, in which he alleged, *inter alia*, that his Rule 35 counsel was ineffective for "failing to ensure that his Rule 35 motion was ruled upon in a reasonable period of time." (R., p.114.) Due to a

complete lack of representation by appointed counsel on his initial Petition, his Petition was dismissed for failure to take action on the matter, including failing to respond to a notice of intent to dismiss. (R., p.114.) When Mr. Parvin learned of the dismissal, he filed a successive Petition in which he reasserted the Rule 35 claim and alleged that his successive Petition was proper because his post-conviction counsel had failed to take any action on his case. (R., pp.114-15.) The district court ruled that Mr. Parvin's successive Petition was proper, but erroneously denied the claim because it believed that it should have been raised on direct appeal. (R., p.115.) In an unpublished opinion, the Idaho Court of Appeals vacated the dismissal, and remanded the matter for a decision on the merits. *Parvin v. State*, 2012 Unpublished Opinion No. 453 (April 30, 2012),¹ pp.7-8.

(Appellant's Brief, p.2-3.)

In concluding that Mr. Parvin was entitled to a decision on the merits of his successive petition, the district court explained:

The record is clear and undisputed that Shari Dodge was appointed conflict counsel on October 21, 2005 and filed nothing on Parvin's behalf at anytime [sic] prior to the action being dismissed on February 26, 2007. Especially notable is the fact that Ms. Dodge failed to respond to the Notice of Proposed Dismissal filed on January 24, 2007. Her failure to do so resulted in the action being dismissed, thus denying Parvin the opportunity to have his action decided on the merits. Parvin has alleged, and it is not disputed, that Ms. Dodge failed to contact him at all, but specifically failed to inform him that his case had been dismissed. Thus, Parvin's attempt to appeal the dismissal of the action was denied as being untimely. The court finds that had Ms. Dodge acted appropriately within her role as conflict counsel in this action, Parvin's first post conviction proceeding would not have been dismissed on the grounds of failure to prosecute. Parvin was denied of the opportunity afforded to him pursuant to I.C. 19-4901 *et seq* . . . the court finds that Parvin was justified in filing the second post conviction action (CV-2008-97123-C) because he received ineffective assistance of counsel in his first post conviction action because the action was dismissed for counsel's failure to take any action on his behalf. This court's finding allows the court to have the 2008 petition relate back to the filing deadlines of the 2003 petition.

(38295 R.,² pp.155-56.)

¹ A copy of the opinion is in the appellate record. (See R., pp.113-20.)

² The record in Docket No. 38295 has been judicially noticed by the Idaho Court of Appeals in this appeal. (Order Taking Judicial Notice.)

ISSUE

Does the Idaho Supreme Court's decision in *Murphy* preclude Mr. Parvin from obtaining relief on appeal?

ARGUMENT

The Idaho Supreme Court's Decision In *Murphy* Does Not Preclude Mr. Parvin From Obtaining Relief On Appeal

In *Murphy v. State*, 156 Idaho 309, 327 P.3d 365 (2014), the Idaho Supreme Court overruled its decision in *Palmer v. Dermitt*, 102 Idaho 591 (1981), in which it had “concluded that an allegation of ineffective assistance of prior post-conviction counsel may provide sufficient reason under I.C. § 19-4908 to permit allegations of error at trial not previously raised or inadequately raised in the initial application to be raised in a subsequent post-conviction application.” *Murphy*, 156 Idaho at ___, 327 P.3d at 370 (citing *Palmer*, 102 Idaho at 596). In overruling *Palmer*, the Court reasoned, “[B]ecause *Murphy* has no statutory or constitutional right to effective assistance of post-conviction counsel, she cannot demonstrate ‘sufficient reason’ for filing a successive petition based on ineffectiveness of post-conviction counsel.” *Id.*, 156 Idaho at ___, 327 P.3d at 371.

The Idaho Supreme Court has recently held that, when a petition for post-conviction relief is dismissed for lack of prosecution by appointed post-conviction counsel, a petitioner may obtain relief by way of Idaho Rule of Civil Procedure 60(b). See *Eby v. State*, 148 Idaho 731 (2010). In *Eby*, Mr. Eby's petition was dismissed for lack of prosecution pursuant to I.R.C.P. 40(c) after “years of shocking and disgraceful neglect of his case by a series of attorneys appointed to represent” him. *Eby*, 148 Idaho at 732. Mr. Eby sought relief, pursuant to I.R.C.P. 60(b), which the district court concluded it could not provide. *Id.* at 734. In concluding that I.R.C.P. 60(b) relief can be available to post-conviction petitioners who have had their petitions dismissed for lack of prosecution by court-appointed post-conviction counsel, the Idaho Supreme

Court, “recogniz[ing] and reiterat[ing] today that there is no right to effective assistance of counsel in post-conviction cases,” reasoned,

[W]e are also cognizant that the Uniform Post-Conviction Procedure Act is “the exclusive means for challenging the validity of a conviction or sentence” other than by direct appeal. Given the unique status of a post-conviction proceeding, and given the complete absence of meaningful representation in the only available proceeding for Eby to advance constitutional challenges to his conviction and sentence, we conclude that this case may present the “unique and compelling circumstances” in which I.R.C.P. 60(b)(6) relief may well be warranted.

Id. at 737 (citations omitted). The basis upon which Mr. Eby urged application of I.R.C.P. 60(b) was “that being prevented a meaningful opportunity to present his claim through the inaction of his state-provided attorney would be a denial of his due process rights and would constitute grounds for relief from judgment based on I.R.C.P. 60(b)(6).” *Id.* at 737.

The Court explained that its holding was “limited in scope, and has potential application only to post-conviction relief proceedings, rather than all civil cases” because, typically, “parties are bound by the actions (and failures to act) of their attorneys.” *Id.* at 736. In a typical civil case, for which monetary damages are at issue, “when [an attorney’s] representation falls below professional standards, the usual course of action is not to vacate the judgment under I.R.C.P. 60(b), but to allow a malpractice suit against the attorney.” *Id.* at 737 (citation omitted).

The holding in *Eby*, which recognized the lack of a right to the effective assistance of post-conviction counsel and was, therefore, not based on a right to the effective assistance of post-conviction counsel, is entirely consistent with the Court’s more recent decision in *Murphy*.³ The key distinguishing factor between the two

³ Lending further support to the continuing viability of *Eby* is that while the *Murphy* decision cites to *Eby* for the principle that “[t]he decision to grant or deny a request for

situations is that, in *Murphy*, the issue concerned whether the ineffective assistance of post-conviction counsel in *litigating* the original post-conviction petition provided a basis for reinstating dismissed claims, while the issue in *Eby* and Mr. Parvin's case is whether the complete lack of action by court-appointed post-conviction counsel resulting in judgments of dismissal for want of prosecution implicates a district court's discretionary power to set aside such default judgments under the Idaho Rules of Civil Procedure when doing so is appropriate to vindicate a post-conviction petitioner's constitutional right to due process of law.

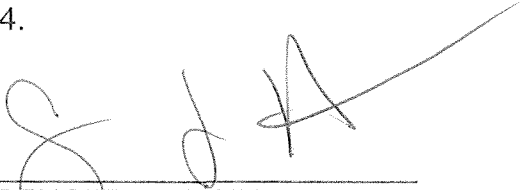
Although in Mr. Parvin's case, the district court did not explicitly rely on I.R.C.P. 60(b)(6) in allowing him to revive the claims raised in his original post-conviction petition, the reasoning that it applied in doing so mirrors that expressed by the Idaho Supreme Court in *Eby*, namely that it was through no fault of his own that he was deprived of the opportunity to obtain a decision on the merits. Even, then, assuming *Murphy* prevents the litigation of a successive petition on such facts, the district court's decision to allow Mr. Parvin's claims to be reinstated can be said to be "right for the wrong reason" based on I.R.C.P. 60(b)(6). See *State v. Avelar*, 129 Idaho 700, 704 (1997) ("Where the district court's order is correct but based upon an erroneous legal theory, this Court will affirm the order on the correct theory.") (citation omitted); see also *State v. Pokorney*, 149 Idaho 459, 463 (Ct. App. 2010) ("When a ruling in a criminal case is correct, though based upon an incorrect reason, it may be sustained upon the proper legal theory.") (citation omitted).

court-appointed counsel lies within the discretion of the trial court," *Murphy*, 156 Idaho at ___, 327 P.3d at ___ 369 (citing *Eby*, 148 Idaho at 738), the Court never expresses any statement disapproving of, or overruling, its decision in *Eby*. *Id.*

CONCLUSION

For the reasons set forth herein, and in his original briefing, Mr. Parvin respectfully requests that this Court reach the merits of his claim and grant him the relief requested: restoration of the original Rule 35 relief granted to him.

DATED this 20th day of August, 2014.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING


I HEREBY CERTIFY that on this 20th day of August, 2014, I served a true and correct copy of the foregoing SUPPLEMENTAL APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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